Riedel International d/b/a Willamette Tug and Barge Co. *and* Inlandboatmen's Union of the Pacific, Marine Division, International Longshoremen's and Warehousemen's Union, Columbia River Region. Case 36–CA–5814

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On May 17, 1989, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a response.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.[2]

The judge found that the Respondent failed and refused to bargain in good faith within the meaning of Section 8(a)(5) of the Act concerning the effects of its decision to sell Willamette by failing to notify the Union of the decision until the day of the implementation of the decision, when it was virtually a fait accompli. In reaching this finding, the judge relied in part on *Walter Pape, Inc*., 205 NLRB 719, 720 (1973), for the proposition that the Respondent should have notified the Union that the sale of Willamette was ''under active consideration''—a proposition with which the Respondent takes issue. In its exceptions, the Respondent argues that no decision to sell the business was reached until it executed a purchase agreement with Knappton, the purchaser, and that it complied with the Act by notifying the Union of the sale and attendant consequences as soon as possible after execution of the purchase agreement.

We agree with the judge that the Respondent presented the Union with a fait accompli concerning its cessation of operations and termination of employees in a manner that was in derogation of its obligation to notify and bargain in advance with the Union about the effects of these events. We find, however, that the judge's characterization of *Walter Pape's* under-active-consideration standard is unworkable as a general rule for establishing effects-bargaining obligations regarding a decision to sell an ongoing enterprise. This is so because such sales negotiations may be complex, conditioned on other factors, and delicate, and as a result the seller may desire, or the purchaser may insist on, strict secrecy to ensure against economic injury to the business, such as the loss of customers until the sales agreement is executed. Premature publicity regarding sales negotiations, rather than promoting the opportunity for effects bargaining, may damage the viability of the operation and needlessly jeopardize the likelihood of any sales agreement being reached in the first instance.

The sale of a business does not depend just on the seller's desire to sell. The sale of a business to a purchaser necessarily requires the purchaser's assent to the terms of the sale before the sale actually takes place. Even after the purchaser and seller agree on the terms, significant contingencies may remain. These may include the purchaser's obtaining financing and nonroutine governmental clearances and approvals. Until these contingencies are satisfied, the seller may not be able to say with any degree of assurance that the sale will go through.

Thus, the sale of a business, unlike certain other nonbargainable decisions involving the scope and direction of a business, is not unilateral in character. The sale may fall through at any time before a purchase agreement is reached. Accordingly, we find no merit in the General Counsel's contention that, for effects-bargaining purposes, an employer is obligated to provide notice to the union as soon as a sale is ''under active consideration.'' We overrule *Walter Pape, Inc*., supra, to the extent it is inconsistent with our decision.

Although we agree with the Respondent that the decision to sell did not occur until the execution of a binding agreement to sell, we find a violation in the Respondent's failure to provide any meaningful prior notice to the Union that it was ceasing business and terminating employees. If a seller and a purchaser can be expected to negotiate about, and draft their agreement to provide for satisfaction of, various contingencies such as governmental clearances, so, too, should they be able to account for the human factor—the employees' interest in having their designated representative notified and given an adequate opportunity to bargain about the effects of the sale. That circumstances may compel confidentiality in arriving at a sales agreement does not obviate the employer's duty to give pre-implementation notice to the union to allow time for effects bargaining,[3] provision for which may be negotiated in the sales agreement.[4] We do not pre-

[1] The judge did not address in his decision the Respondent's apparent defense that securities laws prevented it from notifying the Union of its plans to sell the business. We find the Respondent's argument in this regard unpersuasive. The Respondent has failed to establish how any securities rule or regulation nullifies the obligation to give the Union an opportunity for meaningful bargaining about the effects of the sale of the business.

[2] In agreeing with the judge that a limited backpay remedy is warranted in this case, we note that there is no dispute that the Respondent paid employees for all hours worked, vacation pay, pro rata vacation pay, and floating holiday pay under preexisting obligations. Other than these sums, there is no evidence to support the Respondent's assertion that it paid the employees terminated ''severance pay.''

[3] For the purposes of the above analysis, the term ''implementation'' refers to the actual physical consequences of the sales decision, i.e., the termination of the enterprise and the employees.

[4] Nothing in this discussion should be read to preclude an employer from being able to fulfill its effects-bargaining obligations in advance of a sale, either by negotiating appropriate provisions in a collective-bargaining agreement or by specific negotiations prior to such a sale.

sume here to advise corporate negotiators how to accommodate the right of a union to negotiate the effect of the sale on the employees it represents. We merely decide that, barring particularly unusual or emergency circumstances, the union's right to discuss with the employer how the impact of the sale on the employees can be ameliorated must be reckoned with (as must compliance with other governmental requirements) sufficiently before its actual implementation so that the union is not confronted at the bargaining table with a sale that is a fait accompli. Thus, the Union here was entitled as much notice of the closing and termination of employees as was needed for meaningful bargaining at a meaningful time. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Metropolitan Teletronics*, 279 NLRB 957, 959 fn. 14 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987).[5] We need not decide exactly how many days' notice would be required for such a meaningful opportunity; we find the Respondent's same day notice clearly insufficient. The Respondent therefore violated Section 8(a)(5) and (1) of the Act by closing its operation and discharging the employees without giving the Union adequate notice and an opportunity to bargain over the effects of its sale of the business.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Riedel International d/b/a Willamette Tug and Barge Co., Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[5] Cf. *National Terminal Bakery Corp*., 190 NLRB 465 (1971), in which pre-implementation bargaining (and necessarily notice) were excused. In that case, the Board declined to include a backpay provision in the remedy because ''[the employer's] decision to close its plant and the effectuation of that decision occurred almost simultaneously and resulted from pressing economic necessity.'' 190 NLRB at 465 fn. 1. The Respondent here, in contrast, has failed to establish a similar necessity but only that it desired to maximize the sale price of the assets involved.

Eduardo Escamilla, Esq., for the General Counsel.
Richard N. Van Cleave, Esq. (Spears, Lubersky, Bledsoe, Anderson, Young & Hilliard), of Portland, Oregon, for the Respondent.

DECISION

Statement of the Case

Timothy D. Nelson, Administrative Law Judge. I heard this 8(a)(5) case in trial in Portland, Oregon, on October 4, 1988 (all dates are in 1988 unless I specify otherwise). It stems from a charge filed by Inlandboatmen's Union of the Pacific, Marine Division, International Longshoremen's and Warehousemen's Union, Columbia River Region (the Union) against Riedel International d/b/a Willamette Tug and Barge Co. (Respondent) on May 13, and a complaint and notice of hearing issued against Respondent by the Regional Director for Region 19 on June 21.

The case presents two central issues:

1. Did Respondent violate its statutory obligations to the Union respecting ''effects'' bargaining when it notified the Union that it had decided to sell the assets of its tug and barge division and terminate employees of that division only after it had consummated a sales agreement with the buyer and conveyed assets, and only minutes before it informed employees that they were terminated?

2. If so, is it appropriate to impose a ''limited backpay remedy'' of the type envisioned in *Transmarine Navigation Corp*., 170 NLRB 389 (1968)?

The General Counsel and Respondent filed timely briefs which I have carefully considered. On the entire record, [1] my observations of the witnesses, and my assessments of the inherent probabilities, I make these

I. Findings of Fact[2]

Respondent is an Oregon corporation, headquartered in Portland, whose operations admittedly meet the Board's discretionary standards for taking jurisdiction over the instant dispute. Respondent owns a variety of subsidiary companies, most of which engage in work associated with ''high-risk'' marine construction and dredging. One of its oldest subsidiaries, Willamette Tug and Barge Co. (Willamette), performed ''ship-assist'' work for various steamship companies which operate in the Columbia River and adjacent waterways; it also towed barges and did contract sand and gravel hauling for various local businesses. Willamette's deckhands were represented by the Union and were covered at material times by a labor agreement which was effective by its terms from February 1, 1987, to February 1, 1990.

In 1986 one of Respondent's construction subsidiaries defaulted on certain construction contracts and suffered losses exceeding $30 million, losses which needed to be covered by a major infusion of cash in order for Respondent to be able to continue to obtain the bonding and credit lines necessary to continue as a construction contractor. To meet these needs Respondent thereafter began to liquidate certain of its subsidiaries. By late 1987, still short of the needed cash, and under considerable pressure from its bonding company and main bank lender, Respondent's officers ''sat down and evaluated where we might be going over the next several years and . . . concluded that, of the three remaining operations, the one that perhaps might be the easiest to sell in a short time frame and for which we would realize a reasonable return was the tug and barge business.''[3]

In December 1987, acting on this judgment, Respondent approached Knappton Corporation (Knappton) as a possible customer for Willamette's assets. Knappton seemed a good potential candidate because its parent company, Twin City Barge, was engaged in similar operations. Moreover, Knappton was an especially promising candidate, in the light of Respondent's vulnerable position and immediate needs,

[1] Tr. 16 incorrectly identifies Escamilla, the actual speaker, as ''Mr. Van Cleave.'' I correct the record in that respect.

[2] The record is relatively brief and none of the facts recited below are in contest. Accordingly, I will make only limited reference below to the particular sources for my findings.

[3] Testimony of Respondent's president and chief executive, Ron Witcosky; my emphasis.

because Knappton's principal owner, Peter Brix, was a longtime friend and contemporary of Art Riedel, Respondent's principal owner, and the two men had previously dealt amicably and efficiently on other business transactions. When Respondent's overture generated Knappton's interest, the parties' negotiating teams embarked on what proved to be a complex negotiating process which lasted several months.

On the evening of April 14, Art Riedel and Peter Brix personally joined their respective negotiators in a meeting in the offices of Knappton's attorneys. After much private caucusing with their respective teams, Riedel and Brix met behind closed doors and came to terms on all matters which had not by then been sorted out by their negotiators. Late that evening, as a consequence, the parties signed off on a written purchase agreement, one which contemplated the immediate surrender to Knappton on the following day of the tugs, barges, and other physical assets associated with Willamette's operation. On the morning of April 15, by prearrangement, Knappton's employees were manning Respondent's dispatch office and responding to calls for ''ship assists'' placed to Respondent's existing telephone number. Also, consistent with the April 14 purchase agreement, Respondent had ''assigned'' to Knappton's control the formerly Willamette-owned tugs and barges, even though, for reasons noted below, the bank which was financing the sale had not yet committed the funds to be loaned to Knappton to pay for those assets.

It was not until roughly 11:45 on the morning of April 15 that Respondent's independent labor relations consultant, Norman Burr, came to the Union's office and presented the Union's agent, Terry Parker, with what Burr called a ''present''—a letter which advised, in substance, that Knappton had purchased Willamette's assets, that Willamette was ''closing operations'' as of the ''close of business'' that day, that Willamette's employees represented by the Union would be ''terminated'' at that same point, and that the current labor agreement and the ''bargaining relationship'' between Willamette and the Union would be likewise ''terminated'' at that point. Burr told Parker that he should not ''feel so bad,'' explaining that another union representing deck officers on Willamette's vessels had gotten ''a worse deal.'' Roughly 15 minutes later, Willamette's deckhands received their own letters from Respondent, stating, ''with regret,'' that Willamette had ''closed operations,'' and, therefore, that ''your employment by the Company is terminated.''

This was the first and only notice the Union had received that Respondent had been negotiating the sale of Willamette. Once having been thus notified, the Union wrote to Respondent on April 19, protesting that Respondent had committed a ''contract violation,'' vowing that the Union would file ''unfair labor practice charges,'' and demanding a meeting to ''bargain the effects of this sale on the employees.'' Respondent eventually replied, defending against the claim that it had committed a contract violation, and promising to meet on April 28 to ''bargain over the effects.'' In the April 28 meeting, the Union presented Respondent with a written list of demands, including severance pay linked to length of service, a continuation for a fixed period of certain pension and health benefit contributions, and ''every good faith effort'' on Respondent's behalf to employ affected employees ''at other operations of the company.'' Respondent did not then agree to any of these demands nor make any counterproposals. If there were any further ''effects'' bargaining developments between the parties, the record does not disclose them.

II. ANALYSIS, SUPPLEMENTAL FINDINGS, AND CONCLUSIONS OF LAW

The complaint does not allege that Respondent owed a duty to bargain over its *decision* to sell Willamette; the General Counsel has conceded that Respondent could make that decision unilaterally under the doctrine established by the Supreme Court in *First National Maintenance*.[4] Rather, the General Counsel's prosecutorial focus is on Respondent's statutory obligation to bargain with the Union over the *effects* of that decision on the employees whom the Union represented, a statutory obligation which the Court did not purport to disturb in *First National Maintenance*.[5] But neither does the General Counsel contend that Respondent refused to bargain *at all* about the effects on unit employees of its decision to sell Willamette; thus, it is undisputed that Respondent eventually declared its willingness to bargain over effects, and did engage in at least one such effects-bargaining meeting with the Union, on April 28. And the General Counsel seeks no particular finding that Respondent independently demonstrated bad faith in the course of eventually meeting with the Union for purposes of effects bargaining. Rather, the gravamen of the complaint is simply that Respondent failed to give ''timely'' notice to the Union of the impending sale, and thereby unlawfully deprived the Union of the right, expressly confirmed in *First National Maintenance*, to ''be given a *significant* opportunity to bargain . . . as part of the 'effects' bargaining mandated by Section 8(a)(5),'' more specifically, the right to bargain about effects ''in a meaningful manner and at a *meaningful time*.''[6] Thus, it is the General Counsel's ultimate contention that, in order for ''meaningful'' bargaining to have taken place at a ''meaningful time,'' Respondent should have told the Union about the potential sale of Willamette at some earlier point, that is, at a point which would have allowed a reasonable time for effects bargaining to take place *prior* to any actual sale (and associated termination of Willamette's employees).

The General Counsel is on firm ground in asserting that the duty to bargain over the ''effects'' of a decision normally contemplates that the employer must give ''advance,'' or ''pre-implementation'' notice to the union. See, e.g., *Fast Food Merchandisers*, 291 NLRB 897 (1988) (''The failure to provide *advance* notice and an opportunity to bargain clearly violated Section 8(a)(5) and (1) of the Act''). See also *Metropolitan Teletronics Corp.*, 279 NLRB 957, 958–959 (1986), enfd. 819 F.2d 1130 (2d Cir. 1987), discussed further below.

In defense, Respondent appears to make two basic, independent, contentions, which I address seriatim. Its first defense requires acceptance of the threshold notion that Respondent did not make a ''decision'' to sell Willamette until April 14. Thus, Respondent appears to reason as follows: (1)

[4] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). See also *Otis Elevator Co.*, 269 NLRB 891 (1984).

[5] 452 U.S. at 677 fn. 15 (''There is no doubt that petitioner was under a duty to bargain about the results or effects of its decision to stop the work at Greenpark . . . .'').

[6] 452 U.S. at 681–682. Emphasis added.

Negotiations towards a *possible* sale to a particular buyer cannot be regarded as an actual ''decision'' to sell. (2) Here, therefore, Respondent could not reasonably be held to a duty to notify the Union about its ''decision'' to sell—or to a duty to bargain over the effects on unit employees of such a ''decision''—unless and until it had actually made such a ''decision.'' (3) Since Respondent did not make a ''decision'' to sell until it executed the purchase agreement with Knappton, and since Respondent did, in fact, notify the Union promptly on the heels of its having executed that purchase agreement, Respondent cannot be charged with a failure to give ''timely'' notice to the Union of that ''decision.''

For reasons more fully discussed below, I find this argument, however syllogistically appealing, to be inconsistent with precedent and incompatible with the rights of union-represented employees to bargain over the ''effects'' of their employer's decision to discontinue operations and terminate their employment at a time prior to the implementation of such a decision. But, in fairness to all parties, I must first make supplemental findings relevant to that defense. Thus, consistent with Respondent's arguments, I find that negotiations between Respondent and Knappton were, indeed, lengthy and complex in their substantive details, with some degree of uncertainty about whether they would be able to put together a deal at all; moreover, they were attended at every stage by additional uncertainties because, for reasons of its own, the bank which would finance Knappton's purchase would not make a financing commitment until *after* the parties had already reached a ''done deal,'' that is, not until they had executed a written comprehensive purchase agreement *and* not until Respondent had actually transferred the assets to Knappton's exclusive control. Accordingly, subject to some qualifying observations below, I accept as true Respondent's claim that, at any given stage prior to the signing of the purchase agreement, the parties to the sale were by no means certain that they could reach mutually agreeable terms for concluding the sale. But, if the lack of certainty about an eventual sale to Knappton were, indeed, a relevant consideration in assessing Respondent's obligations here, then it is surely relevant to note additional facts bearing on the issue of ''certainty.''

Thus, for example, Respondent concedes on brief that by February, negotiations between the two companies had reached the ''serious'' stage. And, in fact, it was in mid-February that Respondent disclosed both to labor consultant Burr and to its own main bank lender that it was negotiating with Knappton for a sale of its tug and barge operation. Clearly, therefore, by mid-February, Respondent believed that there was a substantial likelihood that the negotiations would lead to a deal.[7] Accordingly, to the extent it might be relevant for these purposes to distinguish between ''mere explorations'' into the ''possibility'' of selling a business and the ''likelihood'' of an actual sale, the facts herein demonstrate that by February, Respondent had certainly passed beyond the point of ''mere exploration.''

It is also pertinent to note in this same regard that, even though Respondent was admittedly under considerable pressure to come up with a large amount of cash as soon as possible, and even though the sale of Willamette was viewed by Respondent's principals as the only feasible way to accomplish this goal, Respondent admittedly had not engaged in any parallel negotiations for the sale of Willamette with any potential buyers other than Knappton; indeed, it had not in any way solicited other buyers as a ''backstop'' or hedge against the possibility that the negotiations with Knappton might fall through. Thus, even if the precise contours of the sale to Knappton remained in doubt at any given point prior to April 14, and even if the precise timing of an agreement to sell were still in doubt even as late as April 14, it appears that Respondent had been relying to its considerable detriment on the probability that it could make a deal with Knappton, and, therefore, that it was not merely ''exploring options'' in the months preceding April 14. Rather, it had seemingly committed itself as early as December 1987 to sell Willamette, and had substantially committed itself by mid-February, at the latest, to sell Willamette to Knappton.

In the circumstances, it sounds somewhat hollow for Respondent to claim that its ''decision'' to sell Willamette was not reached until April 14; it seems more appropriate to find, as I do, that it had made that decision as early as December 1987, and that it was only the precise timing of the implementation of that decision which remained in doubt in the ensuing months. In such circumstances, the Board does not appear to accord any weight to the fact that the ''final decision'' to sell a business may not have been reached until approximately the same point that the sale was implemented. Rather, for purposes of the employer's duty to notify, it is enough that a sale of a business, or a portion thereof, be under ''active consideration.''[8] Moreover, any other analysis would often leave a union without practical strength to bargain over the effects of a sale of an enterprise. This is so because it is common, if not typical, for the sale of an enterprise to become effective immediately upon the execution of the purchase agreement, with the result that, absent prior notice that a sale was under ''active consideration,'' the employees represented by the union would be terminated by the time the union were to receive notice that a ''decision'' to sell had been reached by the employer.

The same point seems implicit in the Board's decision in *Metropolitan Teletronics*, supra. There, the employer, which operated plants in New York City and in Union City New Jersey, had suffered economic reverses in 1982 and early 1983. In November 1982 it had begun negotiations to acquire new plant space in Jersey City, New Jersey, where it expected to obtain major financial assistance from the New Jersey Economic Development Authority and where it expected to consolidate its operations by relocating them from the former plant locations. By early 1983 it was in default on a large loan and its lender had begun foreclosure proceedings on the New York City plant which had been mortgaged to obtain the loan. By early March 1983 it knew it could not avoid foreclosure on the New York City building. On March

[7] Indeed, Respondent's business attorney, Robert C. Wall, who was closely involved throughout the negotiations, candidly stated at one point in his testimony that, by February, he judged it a ''probability'' that the parties would reach a deal. The balance of his testimony, however, is to the effect that the deal was still in doubt even when the parties entered what proved to be their final negotiating meeting on April 14, so complex was the overall transaction, and so unyielding were the parties prior to that time regarding certain matters affecting the purchase price.

[8] See, e.g., *Walter Pape, Inc.*, 205 NLRB 719, 720 (1973): ''At the very least, Respondent should have advised the Union that the termination of routes was under active consideration and was imminent.''

30, it signed the ''final contract'' for the purchase of the Jersey City facility, even though its ability to make the down payment therefore was contingent on its ability to sell the New York City building. Within a week after March 30, the employer was able to sell the New York City building and use the proceeds to pay off the mortgage loan and to begin the removal of employees and equipment from the old plants, a process which began at the New York City facility by April 10. It was not until April 13, in response to an inquiry from the Union representing New York City employees, that the employer acknowledged that it had decided to close and relocate the New York City operation and expressed a willingness to bargain over the effects of such a decision.

The administrative law judge found that the employer had satisfied its effects-bargaining obligations by its April 13 offer and subsequent exchange of proposals. The Board majority (Chairman Dotson dissenting in part) disagreed, citing *First National Maintenance* (''meaningful manner and meaningful time'') and the First Circuit's decision in *Penntech Papers*[9] for the proposition that ''an element of 'meaningful' bargaining is 'timely notice to the union' of the decision.''[10] The Board construed the employer's action as ''concealing its decision from Local 140 until after it began to vacate the New York City facility,'' and found this to constitute a ''fail[ure] to provide timely notice, thus denying the Union an opportunity to bargain at a time when the Union retained at least a measure of bargaining power.'' Thus, the Board found that ''The Company's belated offer to bargain . . . was no substitute for timely notice of its decision and good faith bargaining before closing.'' Significantly, moreover, the Board did not identify the (early April) date when the employer actually ''sold'' the New York City premises as the ''decision'' date for purposes of triggering a duty to notify the union; rather, the Board focussed on the fact that ''the Company knew by early March 1983 that it would close the New York City plant, but offered no explanation for concealing its plans from Local 140 until after closure.''[11] By parity of reasoning herein, Respondent's duty to notify the Union had ripened as early as the (December 1987) point when its principals had ''concluded'' that a sale of Willamette in the near future was the only available way in which it might expect to continue to operate in the marine construction field.[12]

Respondent cites *Chippewa Motor Freight*, 261 NLRB 455 (1982), as a ''decision which has direct application to the present case.'' I disagree. In *Chippewa*, it is true, the administrative law judge, upheld by the Board, found that the employer did not fail to give adequate notice to the union of its shutdown intentions even though the union did not receive such notice until only about 2 days before the shutdown decision was implemented. But the case is materially distinguishable in a number of particulars. First, the ''decision'' to shut down the employer's terminal was not shown to have been reached ''substantially in advance of the notice;'' moreover, there was no persuasive evidence that the employer had ''concealed'' some earlier shutdown ''decision'' from the union, or had attempted to ''deceive'' the union about some inchoate intention to shut down the business.[13] Indeed, the union had been on notice for several months before the employer announced its decision that the business was losing money, and the employer had previously sought wage concessions from the union, only to be rebuffed with the ''harsh advice'' from the union to ''get out of business'' if it did not feel it could meet its current contractual obligations.[14] Here, of course, the Union had no previous notice in any form of the possibility of a sale of Willamette; indeed, it is implicit in Respondent's second defense, discussed below, that Respondent made a conscious decision to ''conceal'' that information from the Union. Accordingly, Chippewa cannot aid Respondent's defense; neither does it purport to disturb the substantial body of precedent holding that pre-implementation notice is normally an element of an employer's effects-bargaining obligation.

Respondent's second defense appears to be that even if, arguendo, an employer contemplating a sale of a union-represented business owes a presumptive duty to inform the union in advance of any actual ''final decision'' to sell, such a presumption was overcome by the ''extraordinary'' need of Respondent in this case to keep the negotiations a secret from the public (including, incidentally, the Union) in order to enhance the value of the asset to the buyer and thus to enhance its value to Respondent as a device for securing enough cash to meet its debt retirement problems. Thus, Respondent's business attorney, Robert Wall, testified that both Willamette and Knappton were fearful that premature publicity about a sale would cause Willamette customers to ''begin to establish relationships with [another] company . . . that was going to be around on the river.'' For reasons discussed below, I cannot find that such concerns, however, ''legitimate'' from a purely economic standpoint, are sufficient to nullify the Union's presumptive right to advance notice.

It is first appropriate to return to the holding in *Metropolitan Teletronics*, supra, which, in my view, establishes that the range of exceptions to the general requirement of pre-implementation notice is, indeed, quite narrow. In that case, responding to Chairman Dodson's dissent, the majority made plain that it was not ''applying a per se rule that an employer commits an effects-bargaining obligation if it fails to give pre-closure notice to the union of the plant closure decision.'' Rather, ''[t]he rule regarding timely notice is not a per se rule. An employer can avoid 8(a)(5) liability by demonstrating that *emergency circumstances* justified late notice to the Union.''[15]

[9] *Penntech Papers v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983).

[10] 279 NLRB at 959.

[11] 279 NLRB at 959, apparently referring to the Board's earlier finding (id. at 957) that ''By no later than early March 1983 the Company knew it could not avoid foreclosure on its New York City building.''

[12] Technically, it is only necessary to determine herein that Respondent failed to give the Union enough notice to permit effects bargaining to occur for a ''reasonable time'' before implementation of the sale of the business. And, where it is clear that Respondent gave no advance notice to the Union whatsoever, it is unnecessary to decide whether its duty to notify became perfected in December 1987, or ''mid-February,'' or at some even later point.

[13] 261 NLRB at 460.

[14] Ibid.

[15] In referring to ''emergency circumstances,'' the Board cited two of its own prior decisions, *Raskin Packing Co*., 246 NLRB 78 (1979) (no ''notice'' violation where plant closure necessitated immediately by bank's refusal to continue extending line of credit), and *M&M Transportation Co*., 239 NLRB 73 (1978) (no ''notice'' violation when employer stopped operations upon learning that anticipated loan needed to stay in business would not be forthcoming). The Board also cited *Yorke v. NLRB*, 709 F. 2d 1138, 1143–1144 (7th Cir. 1983), as an example of the harmonious ''understanding'' of the ''Courts'' that ''absent special justification, pre-implementation notice is re-

Clearly, therefore, there is a strong presumption in Board law—indeed a ''rule''—that ''advance'' or ''pre-implementation'' notice to a union is an essential element in an employer's fulfilling its effects-bargaining duty. But it is a not a ''per se rule''; rather, ''emergency'' circumstances may excuse the employer's failure to provide such advance notice. And, for the reasons noted below, I conclude that no ''emergency'' prevented Respondent from giving the Union more timely notice of its decision to sell Willamette and terminate its employees.

First, I reiterate the obvious: Respondent's failure to notify the Union substantially in advance of its actual termination of Willamette's employees did not stem from any unanticipated crisis comparable to those in the cases recognized by the *Metropolitan Teletronics* Board as exceptional. Thus, Respondent did not experience a sudden curtailment of financing necessary to keep Willamette operational. Rather, purportedly for reasons more closely linked to a desire to maximize its economic gain from the sale of Willamette, Respondent elected to keep the Union in the dark about its plans to sell.[16]

Second, Respondent has cited no authority for the proposition that such latter ''economic'' considerations are enough in themselves to warrant Respondent's concealment of its intentions from the Union. Rather, Respondent has simply quoted the reasoning employed by the *First National Maintenance Court* for quite a different purpose—to rationalize its holding that certain management ''decisions'' are not bargainable.[17] But the Court's rationale relied on by Respondent is simply inapplicable to the question of Respondent's effects-bargaining obligations. Thus, while the Court held that management's interest in ''secrecy,'' among other considerations, may well outweigh a union's interest in bargaining over a *decision* to terminate a business, the Court nevertheless made plain that its holding did not disturb the duty of an employer to afford a union the opportunity to bargain ''in a meaningful manner and at a meaningful time'' over the *effects* of such a decision. And there is no basis in the decisions following *First National Maintenance* to suppose that a mere ''economic'' interest in ''secrecy'' is enough to defeat a union's presumptive right to pre-implementation notice of a decision to terminate an employing operation. Indeed, as noted in *Metropolitan Teletronics*, only ''emergency'' circumstances can justify a failure to afford a union pre-implementation notice.

Third, and shifting my focus in this regard, there is much reason to doubt that Respondent's wish to keep the Union from knowing about the negotiations to sell Willamette was simply incidental to a more general desire to keep the negotiations a secret from the ''public.'' This doubt is generated by an admission by Respondent's agent that, in fact, the ''confidentiality'' of the purchase negotiations had somehow been compromised. Thus, Respondent's business attorney, Wall, volunteered, ''It became general knowledge in the community that these people were trying to put a deal together. I'd have people stop me on the street and say, 'Hey, I hear you guys are selling out.' And . . . I'd smile and nobody could take it seriously. The community knew about it. The River knew about it but nobody believed that anything so complex could ever occur.'' Thus, apart from any other considerations discussed earlier, it appears that the very persons whom Respondent claimed it wished to prevent from knowing about the negotiations with Knappton (i.e., Willamette's customers on ''The River'') were nevertheless aware of those facts. And in such circumstances, it becomes doubly hard to excuse Respondent's failure to give the Union the benefit of the same information which apparently pervaded the business community on ''The River.'' Thus, it strikes me as not merely speculative in the circumstances to suspect that Respondent may have been more interested in avoiding the unwanted consequences of ''meaningful'' effects bargaining with the Union than any of the other consequences which it has invoked to explain its failure to give pre-implementation notice to the Union.

Based on the foregoing, I conclude that Respondent failed and refused to bargain in good faith within the meaning of Section 8(a)(5) when it did not notify the Union of its decision to sell Willamette until the implementation of that decision was virtually a fait accompli.

THE REMEDY

Having found that Respondent committed unfair labor practices, I shall recommend that Respondent cease and desist therefrom and that it take certain affirmative remedial action of the type envisioned in *Transmarine*, supra,[18] to restore the Union, as nearly as possible, to the status it would have occupied had Respondent given timely notice of its decision to sell Willamette. Specifically, Respondent shall be required to pay backpay to the employees represented by the Union who were terminated by Willamette at the rate of their normal wages when last in Willamette's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) The date Respondent bargains to agreement with the Union on the subjects pertaining to the effects of their April 15, 1988 termination; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to any of those employees exceed the amount they would have earned as wages from April 15, 1988, the final day of Willamette's operations, to the time they secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided

quired to satisfy the obligation to bargain over effects.'' 279 NLRB at 959 fn. 14.

[16] For present purposes, I presume the truthfulness of Respondent's claims that it wanted the negotiations to remain a secret from the public in order to enhance the value of Willamette as a marketable asset. But, as I explain below, I cannot ignore other evidence tending to suggest that it was primarily the Union which Respondent wished to keep in a state of ignorance about the negotiations to sell Willamette.

[17] Thus, Respondent stresses the Court's language (452 U.S. at 682–683) that ''management may have great need for speed, flexibility, and secrecy . . . . *The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business*.'' (Emphasis added.)

[18] I note that nothing in this record suggests the existence of any ''mitigating'' circumstances which might militate against the imposition of a *Transmarine* remedy. Thus, Respondent terminated all of Willamette's deckhands represented by the Union; it paid them no severance moneys; it made no provision, so far as this record shows, for employing them in any other of its operations; and only an indefinite number of them were hired by Knappton, under uncertain wages and benefits, after Knappton's takeover. Cf. *Raskin Packing Co*., 246 NLRB 78, 80 (1979).

however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. Backpay shall be based on the earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Riedel International d/b/a Willamette Tug and Barge Co., Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with Inlandboatmen's Union of the Pacific, Marine Division, International Longshoremen's and Warehousemen's Union, Columbia River Region, concerning the effects on employees represented by the Union of its decision to sell Willamette Tug and Barge and to terminate the employees of that division.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union with respect to the effects on employees represented by the Union of its decision to sell Willamette Tug and Barge and to terminate its employees, and, if an understanding is reached, embody it in a signed document.

(b) Pay the employees represented by the Union who were terminated on April 15, 1988, their normal wages for the appropriate period as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Sign and mail copies of the attached notice marked ''Appendix''[20] to all employees represented by the Union who were terminated on April 15, 1988, to their last known address; and similarly sign and mail copies to the Union at its business address.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to give timely notice to unions representing our employees of our decision to sell an operation or to terminate employees pursuant to such a decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the Union with respect to the effects on the employees it represents of our decision to sell Willamette Tug and Barge and to terminate the employees of that division.

WE WILL pay backpay to the employees represented by the Union who were terminated on April 15, 1988, when we sold Willamette Tug and Barge to Knappton Corporation, all as more particularly specified in the Board's Order, plus interest.

RIEDEL INTERNATIONAL D/B/A WILLAMETTE
TUG & BARGE CO.